86-535

Supreme Court, U.S.
FILED
SEP 26 1986
JOSEPH F. SPANIOL, CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1986

BESSIELOVE LEE,

Petitioner,

v.

UNION ELECTRIC COMPANY a corporation, and UNION ELECTRIC RETIREMENT PLAN,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A key mandate of the Employees Retirement Insurance Security Act ("ERISA"), 29 U.S.C. Secs. 1001 et seq., and of the Department of Labor Regulations issued pursuant thereto, 29 C.F.R. Sec. 2520.102-2 et seq. is that employees shall be clearly informed as to how to avail themselves of their rights under retirement plans. The principal mechanism for providing this information is a "summary plan description." 29 U.S.C. Sec. 1022(a).

1. THE FIRST QUESTION for review is whether a summary plan description complies with these requirements if it does not state explicitly that an employee's failure affirmatively to elect an optional survivor benefit will

leave his or her surviving spouse unprotected if the employee dies before retirement.

2. THE SECOND QUESTION for review is whether, in order to obtain relief on the basis of a faulty summary plan description, a surviving widow/beneficiary must show that her deceased employee-husband had relied on or been prejudiced by the faulty summary, or whether, as in the case of proxy statements, causation should be presumed (Mills v. Electric Auto-lite Co., 396 U.S. 375) and, as in securities cases involving a failure to disclose, "positive proof of reliance" should not be required (Affiliated Ute Citizens v. U.S., 406 U.S. 128).

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(A) In holding the summary plan description adequate despite its failure to specify the need for an affirmative election, the decision below subverts a principal mandate of ERISA intended to guarantee to millions of employee-retirement-plan participants the same fullness of information assured to investors by federal securities laws;

(B) The decision below, in exacting an unrealistic standard for proof of reliance, conflicts

with holdings of this Court in securities cases and frustrates effectuation of ERISA's guarantee of full information.

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OPINIONS BELOW

After a trial without a jury, judgment was rendered in favor of Respondents by the District Court for the Eastern District of Missouri, Eastern Division, Hungate, J., 606 F. Supp. 317 (E.D. Mo. 1985).

The Court of Appeals for the Eighth Circuit affirmed in an opinion filed May 2, 1986, which on July 2, 1986 was modified by that Court of its own motion simultaneously with its denial of Petitioner's Petition for Rehearing. 789 F.2d 1303 (8th Cir. 1986).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals was filed on May 2, 1986.

Petitioner's Petition for Rehearing was denied by order of that court entered July 2, 1986.

This court has jurisdiction, by writ of certiorari, to review the Court of Appeals judgment by virtue of 28 U.S.C. Sec. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, which are set out verbatim in the Appendix, are:

29 U.S.C. Sec. 1022(a)(1) and (b) ("Plan description and summary plan description")

29 U.S.C. Sec. 1024(b)(1), (2) and (4) ("Publication of summary plan description to participants and beneficiaries of plan")

29 U.S.C. Sec. 1029(c) [Authority of the Secretary to issue regulations]

29 C.F.R. Sec. 2520.102-2(a)(1) and (b) ("Style and format of summary plan description")

29 C.F.R. Sec. 2520.102-3(j)(1), (k), and (L) ("Contents of summary plan description")

STATEMENT OF THE CASE

1. Jurisdiction of the District Court

Jurisdiction of the District Court was invoked under 29 U.S.C. Sec. 1132 (e)(1).

2. Survivorship benefits denied for want of election

This action for a survivor benefit or damages in lieu thereof was brought under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Secs. 1001 et seq., by the widow of a long- time employee and plan-participant of respondent Union Electric Company.

Petitioner's husband died at age 61 before having retired. Petitioner's claim for the survivor benefit was rejected by Respondents on the ground that, while she would have been eligible for the survivor benefit if her husband had lived to 65, her husband had not made the affirmative election which (as both courts below have held) was required under the Plan to entitle his widow to that benefit upon his death between ages 55 and 65 <u>while still working</u>.

Although additional grounds were asserted by Petitioner below (and decided adversely to her by the District Court or the Court of Appeals, or both) this Petition is grounded on Count III which alleges that, in breach of their duty under 29 U.S.C. Sec. 1022 (Sec. 102

of ERISA) Respondents failed to inform Petitioner's husband of the necessity for making that affirmative election.

Prior to enactment of ERISA, Respondents' Retirement Plan required an affirmative election by an employee if he wished, in exchange for a reduced monthly retirement payment, to have pension payments continue for his spouse, whatever his age at death. To conform to ERISA the Plan was amended to provide that, unless the employee had expressly opted out, after retirement at 65 his pension would continue for his surviving spouse at 50% of his monthly rate with a compensatory reduction in his payments so long as he lived.

As amended the Plan also provided (although this was not required by ERISA) that, if he retired between 55

and 65 his pension would likewise include a 50% benefit for his surviving spouse, unless he opted out. However, absent an affirmative election choosing the survivor benefit, one contingency was not covered: death between 55 and 65 while still employed (not retired), the fate which befell Petitioner's husband, who had not made this election.

3. Requirements of ERISA as to "Summary Plan Description"

So that plan participants will be informed of their rights and the pertinent terms and conditions, ERISA requires that they be furnished a "summary plan description" which has to be "sufficiently accurate and comprehensive to reasonably apprise such participants . . . of their rights and

obligations under the plan" and which has to contain, inter alia (29 U.S.C. Sec. 1022)(b):

> the plan's requirements concerning eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.

In regulations issued pursuant to 29 U.S.C. Sec. 1029(c), the Department of Labor required that the summary must include (29 C.F.R. Sec. 2520.102-3):

> (k) . . . a statement describing any joint and survivor benefits provided under the plan, including any requirement that an election be made as a condition to select or reject the joint and survivor annuity.
>
> (L) . . . a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to

provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

4. Respondents' Summary Plan Description

The relevant portions of the September 1982 Summary Plan Description furnished by respondents to plan participants provide:

NORMAL METHOD OF PAYMENT IF YOU ARE MARRIED

If you are legally married at the time of your retirement, your normal method of payment of Retirement Income will be in the form of 50% Survivor Benefit Option under which your spouse is named as your survivor beneficiary. You will be paid a reduced Retirement Income and the amount of reduction will depend on the sex and age of your spouse. If your spouse survives you, your spouse will be paid 50% of the amount you were being paid, and for the remainder of his/her life.

If you do not want this normal method of payment, you will have the opportunity to elect not to be paid under the provisions of the 50% Survivor Benefit Option.

* * *

OPTIONAL FORMS OF RETIREMENT INCOME

The Plan provides optional forms of Retirement Income. These options may be elected by you, subject to the provisions of these options:

(a) 50% Survivor Spouse's Benefit Option for employees age 45 to 55 who are 100% vested.

* * *

(b) Survivor Benefit Option for employees age 55 to 65

This Survivor Benefit option enables you to provide 25%, 50%, 75% or 100% of your Retirement Income to be payable, after your death, to your spouse or any other person you name as your survivor beneficiary if you are willing to take a smaller Retirement Income when you retire. . .

[The Court of Appeals, without discussion, disregarded Petitioner's contention that adequacy of the summary

should be judged by the pre-1982 version, which did not mention a survivor benefit for employees age 55 to 65: Petitioner's husband died 9 months after issuance of the 1982 summary and a year's lead-time was required for an election to become effective. The prior, 1977, text, appears in the Appendix, pp. A78-A85].

5. Relevant Portions of Opinion of the Court of Appeals

The Court of Appeals wrote (in the original form of its opinion):

> . . .The summary plan booklet provided examples of the various payment forms in operation. In none of the examples, however, nor in the Plan terms, is it stated that an employee who dies before retirement without having elected the Survivor Benefit Option will not have provided survivor benefits for a spouse.
>
> * * *
>
> While the summary does not state explicitly that an employee's failure to choose an optional

> survivor benefit plan will leave his surviving spouse unprotected if the employee dies before retirement, we do not believe that section 1022(a) requires such a statement. The Plan [Petitioner's emphasis] states that employees must elect an alternative option to provide annuity payments to a surviving spouse in the event of the employee's death before retirement. It would be tautological to require the Plan [Petitioner's emphasis] also to state that if the Option is not elected, its benefits will not be available.

Later, "of its own motion" but after Petitioner had petitioned for rehearing on the ground that the Court had erroneously referred to the plan instead of the summary plan description, the Court inaccurately and artlessly amended the emphasized words to refer to the summary plan description instead of the plan: hence the amended opinion wrongly ascribes to the summary plan description

a reference to death before retirement which the summary does not contain.

The opinion of Court of Appeals goes on to say:

> The district court, having concluded that the summary plan description satisfied section 1022(a), further held that even if the summary description was not sufficiently clear, Mr. Lee was fully apprised of the relevant Plan provisions by the June 1974 letter and other pre-ERISA disclosures. The district court found that no evidence was introduced to show that Mr. Lee showed any interest in the Survivor Benefit Option...
>
> Our decision rests on our determination that the summary plan description adequately explained the need for an election. We think it is appropriate to note, however, that even had we found that the summary plan description was inadequate, the absence of any indication that Mr. Lee expressed any interest in the Survivor Benefit Option, despite the repeated opportunities to do so, would pose a significant barrier to recovery. To secure relief on the basis of a faulty summary plan description, the claimant

must show some significant reliance on, or possible prejudice flowing from the summary. . .

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE

(A) In holding the summary plan description adequate despite its failure to specify the need for an affirmative election, the division below subverts a principal mandate of ERISA intended to guarantee to millions of employee-retirement-plan participants the same fullness of information assured to investors by federal securities laws;

(B) The decision below, in exacting an unrealistic standard for proof of reliance, conflicts with holdings of this Court in securities cases and frustrates effectuation of ERISA's guarantee of full information.

The object of ERISA is protection of the pension and welfare rights of employees and their beneficiaries. An important facet of that protection is the requirement for furnishing full and

accurate information to participants and beneficiaries. This information requirement calls for a summary plan description which, as we have pointed out, must include a statement of circumstances which could lead to forfeiture and of the circumstances in which an election may be required. None of this was present in the Union Electric summary plan description and, indeed, Mr. Lee was positively misled into thinking that the normal method of annuity was by joint and survivor if he died, which he did.

ERISA was enacted in 1974. Some 40 years earlier Congress had enacted the Securities Act of 1933, 15 U.S.C. Secs. 77a et seq., and the Securities Exchange Act of 1934, 15 U.S.C. Secs. 77b et seq.

There is a striking analogy between those two Acts and ERISA. The New Deal securities legislation was designed to protect securities investors by requiring full and truthful disclosure. That purpose is directly comparable to the aim of ERISA's information requirements to protect retirement plan participants and beneficiaries. Just as investors in securities, persons participating in pension plans number in the millions. For the vast majority of pension participants, the plan represents a primary and often sole income source for retirement and for support of a surviving spouse. Furthermore, it is likely that most pension plan participants are less sophisticated than securities investors. Yet the decision below holds that

notwithstanding express statutory and regulatory mandates, a summary plan description did not have to spell out the pre-conditions for this widow's survivor benefit.

On the question of standard of proof of reliance, we ask the Court to consider two cogent and highly pertinent decisions:

> Mills v. Electric Auto-lite Co., 396 US 375, 24 L.ed. 2d 593, 90 S. Ct. 616 (1970)
>
> Affiliated Ute Citizens v. U.S., 406 US 128, 31 L.ed. 2d 741, 92 S. Ct. 1456 (1972)

In Mills, certain shareholders, sued to set aside enjoin a merger vote on the ground of material omissions from the proxy statement. In sustaining the shareholders, the Court held:

> Where a misstatement or omission in a proxy statement has been shown to be "material", as it was found to be here, that

determination itself indubitably embodies a conclusion that the defect was of such a character that it might have to be considered important by a reasonable shareholder who was in the process of deciding how to vote . . .

There is no need to supplement this requirement [that the defect have a significant propensity to affect the voting process] as did the Court of Appeals, with a requirement of proof of whether the defect actually had a decisive effect on the voting. Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected,and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that shareholders are able to make an informed choice. . .

--396 U.S. at 384-5

In Affiliated Ute, the plaintiffs had sold securities to the defendants, who had, inter alia, named the price without disclosing that the going price was considerably higher. Suit was brought under well-known Rule 10b-5, 17 C.F.R. Sec. 240.10b-5, issued under Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78j. The Court held:

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in making this decision . . . This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.
>
> -- 406 U.S. at 153-54

Mills and Affiliated Ute are especially apposite here because, whereas the securities plaintiff is usually alive, in cases involving survivor benefits the employee is dead and cannot testify as to reliance and causation. While Petitioner believes that the circumstantial evidence (including the testimony of Respondent's own employees) adequately proves Mr. Lee's belief that he had a joint and survivor annuity, the practical difficulties of proving directly that a deceased employee was misled into believing that his or her spouse would receive an annuity after the employee's death are enormous. Hardly anyone can meet that burden and ERISA and its regulations would be meaningless if there is no recovery for losses caused

by employer's faulty summary plan descriptions.

CONCLUSION

Certiorari should be granted because this case presents important federal issues affecting millions of participants in and beneficiaries of employee retirement plans.(*)

Respectfully submitted,

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(*) Respondents may contend that the 1984 amendment, Pub.L. 98-397, Title I, Sec. 103(a), to 29 U.S.C. Sec. 1055 ("Requirements of joint and survivor annuity and preretirement survivor annuity") diminishes the importance of the questions presented for review. As

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amended in 1984, this section of ERISA requires that every retirement annuity be in the form of a 50% survivorship annuity unless the participant elects otherwise with the written and witnessed consent of the spouse beneficiary. However, the importance of assuring complete information and of the problem of proving reliance obviously go beyond the particular facts of the present case; moreover, even under amended annuity provisions it remains necessary to acquaint participants and beneficiaries with the relevant terms and conditions of the annuity.